IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

MONDAY, THE 29TH OCTOBER 2007 / 7TH KARTHIKA 1929

Crl.MC.No. 2683 of 2007()

AGAINST THE ORDER DATED 01/08/2007 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I, KANNUR

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PETITIONER:COMPLAINANT

HOUSING DEVELOPMENT FINANCE CORPORATION LTD,BRANCH OFFICE AT HDFC HOUSE,REP.BY JUNIOR OFFICE RECOVERY MR.ARUN KUMAR.

BY ADV. SRI.KKM.SHERIF
SRI.P.M.KUNJIMOIDEENKUTTY
SRI.LAL K.JOSEPH
SRI.A.A.ZIYAD RAHMAN
SMT.SHEENA SAMUEL

RESPONDENTS: ACCUSED

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1. KANISAN PARAMBIL KELU,C/O.NALINI C.K, CHILANKA,OPP.JTS,THOTTADA,KANNUR - 670 007..

2. STATE OF KERALA REP.BY THE PUBLIC PROSECUTOR,HIGH COURT OF KERALA,ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.M.S.BREEZ

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 29/10/2007, ALONG WITH CRMC NO. 2697 OF 2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.Nos.2683 & 2697of 2007

Dated this the 29th day of October, 2007

O R D E R

Is it invariable that the complainant must appear in person before a Court to file a complaint ? If the complainant is not personally present, will the Magistrate be justified in not receiving the complaint at all ? Is it possible for the Magistrate to receive the complaint and post the case for recording the sworn statement to a later date after condoning the absence of the complainant on the date of presentation ? In a case like Section 138 of the Negotiable Instruments Act where the personal presence of the complainant is not necessary for recording the sworn statement under Section 200 Cr.P.C and an affidavit in its place has been filed under Section 145 of the Negotiable Instruments Act, is it at all necessary for the Magistrate to insist on the personal appearance of the complainant/his attorney ? These are the questions that arise for consideration in these Crl.M.Cs.

2. The common petitioner - H.D.F.C Ltd. is the complainant in 2 separate prosecutions - both before the learned Judicial Magistrate of the First Class-I, Kannur. The prosecutions are initiated under Section 138 of the Negotiable Instruments Act. The complaints were presented before the learned Magistrate by the counsel for the

petitioner. The petitioner is an incorporated body. An officer of the petitioner company, who is authorised under a deed of power of attorney, has filed the complaints in the name of the petitioner company. Both complaints were presented along with applications to condone the delay in filing the complaints. When the complaints were presented, the power of attorney holder of the petitioner was not personally present. He made applications to condone his absence on the date of presentation. Those petitions were rejected. The complaints were returned to the complainant's counsel for later presentation. Aggrieved by the course adopted by the learned Magistrate, the petitioner has come before this Court.

3. A complaint is defined under Section 2 (d) Cr.P.C as follows:

> "Complaint means any allegation made **orally or in writing** to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."
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> (emphasis supplied)

Such a complaint can either be oral or in writing. So far as the complaint under Section 138 of the Negotiable Instruments Act is concerned, in view of Section 142 of the Negotiable Instruments Act, the complaint has got to be in writing. The first question is whether

the complainant must be present in person to prefer the complaint. The learned counsel for the petitioner Sri.Ziyad Rahman contends that there is no stipulation anywhere in law which makes it obligatory for the complainant to appear in person to present the complaint. With limitation having been prescribed for filing the complaint under Chapter XXXVI of the Cr.P.C a rigid insistence on the personal appearance of the complainant would work out great hardship, prejudice and inconvenience to the complainants at least in some cases, urges counsel. In a case where sworn statement of the complainant under Section 200 Cr.P.C need not be recorded at all, there is absolutely no warrant for insistence on the personal appearance of the complainant at the pre-cognizance stage, contends the counsel.

4. The contention raised is interesting and a matter of daily occurrence and relevance in criminal courts. The learned counsel for the petitioner was hence requested to advance detailed arguments. Cognizance can be taken by a criminal court in one of the 3 modes permitted under Section 190 Cr.P.C. It can be on receiving a complaint of facts; it can be upon a police report of such facts or it can be upon information received from any person other than a police officer or upon knowledge of the Magistrate. What is significant

according to me is that Section 190 Cr.P.C does not anywhere expressly or by necessary implication suggest or insist that such a complaint can be presented only personally by a complainant by appearing in court.

5. Of course in a normal complaint in which recording the sworn statement under Section 200 Cr.P.C is necessary, the complainant will normally have to appear before the learned Magistrate as such statement will have to be recorded to proceed to the next stage of enquiry. But what is of relevance is that even in Section 200 Cr.P.C, there is no mandate that the complainant must appear personally on the date of presentation of the complaint. When the complaint is presented, the next step, if the complaint is not referred under Section 156(3) Cr.P.C, is to record the sworn statement of the complainant. I have gone through Section 200 Cr.P.C as also the other stipulations in Chapter XV. I am unable to spell out a rigid insistence under the Code that the complainant must be present personally to present a complaint as defined under Section 2(d) Cr.P.C before the learned Magistrate for the Magistrate to take cognizance. To save limitation, it is certainly possible for the complainant to appear through pleader and present the complaint and seek condonation of his absence and leave to appear on a later date to record sworn

statement. In an appropriate case, a Magistrate can certainly condone the absence of the complainant and direct him to appear personally on a later date for recording the sworn statement under Section 200 Cr.P.C.

6. But in a prosecution under Section 138 of the Negotiable Instruments Act, even that does not appear to be necessary. The complaint has got to be in writing as insisted by Section 142 of the Negotiable Instruments Act. The requirement of recording sworn statement of the complainant under Section 200 Cr.P.C is there in a complaint under Section 138 of the Negotiable Instruments Act also. But Section 145 of the Negotiable Instruments Act clearly shows that evidence of a complainant can be given on affidavit. The question did come up for detailed consideration in **Vasudevan v. State of Kerala** [2005(1) K.L.T 220], and it was held that proceedings under Section 200 Cr.P.C is inquiry and an affidavit by a complainant can be received in the place of sworn statement to be recorded under Section 200 Cr.P.C.

7. If that be so, the presence of the complainant becomes not necessary for recording the sworn statement under Section 200 Cr.P.C. Of course, if the case falls under the just exceptions under Section 145 Negotiable Instruments Act, the Magistrate undoubtedly

has jurisdictional competence to insist on personal appearance of the complainant. But otherwise it does not appear to me to be necessary to insist on personal appearance of the complainant invariably in all cases when complaint is presented.

8. Though not specifically for consideration of this aspect, the observations made in para.16 and 17 of **Vasudevan** (supra) also throw light on this aspect.

> Para.16: Thus, it follows from the above discussions that the proceedings before the Criminal Court at a stage prior to S.203/204 Cr.P.C will be inquiry. The statement of a complainant to be recorded under S.200 Cr.P.C will be evidence. In these circumstances, S.145 of the N.I Act squarely applies and it will be permissible for the Court to receive the affidavit filed under S.145 of the N.I Act at the stage of S.200 Cr.P.C and to act upon the same. It is unnecessary ordinarily to insist on personal appearance of the complainant to tender the sworn statement at that stage.
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> Para.17: I have no hesitation to opine that the Courts are obliged to follow that course. The Parliament and the working group set up by the Parliament had come to the conclusion that preliminary evidence can be recorded by receiving evidence on affidavit without insisting on personal appearance and examination of the complainant. The Legislature was prescribing a remedy for a malady which it perceived. Courts cannot insist that the complainant must appear before Court and tender sworn statement in all cases. Such insistence would

> certainly run counter to the mandate of S.145 of the N.I Act. The purpose of S.138 of the N.I Act would be stultified and frustrated if there is no expeditious disposal of the complaints under S.138 of the N.I Act. The Legislature had permitted reception of affidavits by complainants as evidence in prosecutions under S.138 of the N.I Act to achieve that result. It is therefore imperative, unless the case on hand falls within the "just exception" contemplated under S.145 of the N.I Act that the Criminal Courts must receive affidavits as evidence at the stage of S.200 Cr.P.C also and should not insist on personal appearance and examination of the complainant to give sworn statement."

9. As the law of limitation is applicable to criminal cases also, a complainant is bound to present the complaint within the stipulated period of time. If within the stipulated period of time a complainant is not able to appear in person and present the complaint, according to me, there is nothing in law which prohibits the presentation of the complaint in court through counsel. Of course, I repeat that in an appropriate case, the learned Magistrate can insist on personal appearance to record the sworn statement under Section 200 Cr.P.C. In a prosecution under Section 138 of the Negotiable Instruments Act, if the case comes within the just exception under Section 145 of the Negotiable Instruments Act, the learned Magistrate can direct the complainant to appear on a later date. But at any rate, the insistence

that the complainant must appear in person to present the complaint invariably in all cases does not appear to be justified.

10. In the facts of the instant case, the complainant is a company. The company cannot appear in person being an incorporated fictitious legal person. Such a company files complaints through the power of attorney holder of the company. It appears to me to be absolutely unnecessary in such a case to insist on the personal appearance of the attorney of the company to make the presentation of the complaint valid and legal.

11. The above discussions lead me to the conclusion that the insistence made by the learned Magistrate is not justified. The petitioner shall be at liberty to represent the complaint before the learned Magistrate and the learned Magistrate must receive the complaint without insisting on the personal appearance of the complainant ie. the attorney of the company. This of course is subject to the exception that if found necessary under Section 145 of the Negotiable Instruments Act, the person who has sworn to the affidavit can be directed to appear.

12. The complainant shall re-present the complaint before the learned Magistrate within a period of 15 days from this date, in which event, it shall be reckoned that the learned Magistrate had issued a direction under Rule 68 of the Kerala Criminal Rules of Practice to

represent the complaint and such representation shall refer back to the date of original presentation.

13. This Crl.M.C is allowed with the above observations.

(R.BASANT, JUDGE)

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